No. 135

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In the

Supreme Court of the United States

OCTOBER TERM, 1949

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners, *Petitioners*,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY, *Respondent*,

A. J. GOERIG and CLYDE PHILP, individuals and copartners, *Defendants*,

CONTINENTAL CASUALTY COMPANY, a corporation, *Additional Petitioner*.

REPLY TO BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

This reply to respondent's brief is respectfully submitted as directed only to those salient points basically determinative for issuance of a writ of certiorari as prayed, prefaced by the following citations.

Since filing our petition herein the Supreme Court of the United States, on June 20, 1949, decided the following three cases, in each of which the provisions of state statutory enactments controlled. In *Cohen v. Beneficial Industrial Loan Corp.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1224, 69 S. Ct. 1221, the judgment of the court of appeals (3rd Cir.) was affirmed so as to require for the benefit of a non-resident corporation

security for costs in a stockholders' derivative suit against it in a federal court in New Jersey, as prescribed by the laws of New Jersey for such type of suit. In *Woods v. Interstate Realty Co.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1245, 69 S. Ct. 1235, the judgment of the court of appeals (5th Cir.) was reversed to deny a non-resident corporation right to sue in a federal district court in Mississippi because such corporation had failed to qualify for doing business in that state as required by the laws thereof. In *Ragan v. Merchants Transfer & Warehouse Co.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1248, 69 S. Ct. 1233, the judgment of the court of appeals (10th Cir.) was affirmed to grant summary judgment in a tort action started by filing complaint in a federal district court in Kansas and conducted agreeable to Federal Rules of Civil Procedure, within, but without having service made within, the two-year period required for suit by the laws of Kansas.

For the basic case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. ed. 1188, it is clear that its application includes substantive rights, but difficulty exists in distinguishing to a nicety and in categorizing substantive and procedural rights arising under statutes or decisions. The premise of the *Erie R. Co. v. Tompkins* case is that both resident and non-resident suitors in federal courts shall be on equal basis, without handicap from a state's laws or decisions to either a resident or a non-resident of such state. Tersely put, if a state resident cannot do a certain thing, a non-resident also cannot do so in that state, even in a federal court. The basic right or lack of right and

not the forum is the decisive consideration in the *Erie R. Co. v. Tompkins* case and in subsequent decisions, including the above three cases decided June 20, 1949, in this court.

FAILURE TO FILE TIMELY ASSUMED TRADE NAME REQUIRED BY THE LAWS OF WASHINGTON

Under the foregoing, and under analogy of facts particularly as disclosed by *Woods v. Interstate Realty Co.*, ... U.S. ....., 93 L. ed. (Adv. Op.) 1245, 69 S. Ct. 1235, we submit that Schaefer's failure to file timely a certificate of assumed trade name as required by the laws of Washington, bars his right to litigate in this action.

Respondent brief presentation (pp. 46-50) of quotations of Rule 17(b), Rules of Civil Procedure, coupled with respondent's residence in the State of Oregon, and quotation of a portion of Rule 9(a), Rules of Civil Procedure, without disclosing the record change of pleadings as they were ordered, and also the citations to the three federal cases (p. 48) from one circuit and two district courts do not answer petitioners' presentation on Schaefer's failure to comply with Washington law regarding operations under an assumed trade name (Pet. Br. 39-41). The fact of Schaefer's failure to file assumed trade name could not be established affirmatively until Schaefer took the stand. Up to that very moment Schaefer could have complied with the Washington statute and have been thereby freed from any charge of non-compliance. Differently from respondent's said cited cases, it was a continuing right for Schaefer to exercise until he

was challenged, not some accomplished fact that could have been pleaded against him theretofore.

Schaefer did not by his pleadings, at trial, on the review by the Court of Appeals for the Ninth Circuit, or at all, until filing answering brief herein, invoke either Rule 17(b) or Rule 9(a) of Rules of Civil Procedure. His pleading is found in the record at R. 3, par. 2; R. 10, par. 17; petitioners' answer thereto admitted all that Schaefer alleged in his par. 2 (R. 13, par. 2) and denied on lack of knowledge and demanded proof of the allegations of his par. 17 (R. 16, par. 14) and of the allegations of his par. 1 (R. 2), as referred to in such par. 17 (R. 13, par. 1). There was no question of outlawing involved under respondent's cited federal rules, because the right of Schaefer to comply remained a continuing one, in his own hands and volition to meet at any time before challenge. He was challenged as soon as he disclosed he had not exercised the right accorded by the laws of the State of Washington (R. 179-180). Schaefer then filed his certificate of assumed trade name (Ex. 59) but the court in accepting such Ex. 59 ruled (R. 673):

> "THE COURT: I think that's a reasonable position. The complaint would have to be construed as amended to conform to the proof here. There is no allegation that the certificate was filed, and it is so considered, that it will be amended to show the filing as of this date, and it will be understood that the defendant's answer will be considered to show that it was not proper compliance."

Respondent's brief (p. 50) urges the United States Supreme Court to disregard the Washington statutory

requirements and invoke aforesaid cited Rules of Civil Procedure, following respondent's explanation (p. 49) of the statute so as to fit what Schaefer did do. Respondent does not cite either the one very recent case of the Washington Supreme Court or the aforesaid three United States Supreme Court cases.

The Washington Supreme Court on July 14, 1949, decided *Neill v. Bennett*, 134 Wash. Dec. 115, 116-117, ... P.(2d) ....., in line with its 1922 holding in *McCreery v. Graham*, 121 Wash. 466, 209 Pac. 692, holding that use of the Neill surname in the trade name of Neill Electric Co. excused filing a certificate under Secs. 9976, 9977 and 9980 of Rem. Rev. Stat. of Washington. In such *Neill* case it is stated, which conversely would reconfirm that otherwise it would be necessary to file a certificate of assumed trade name, as follows:

> "* * * It was not necessary to file or allege the filing of a certificate of assumed name to comply with Rem. Rev. Stat., §§ 9976, 9977 and 9980 (P.P.C. §§ 768-21, -23, -29), since the Neills were doing business under their true surname. See *McCreery v. Graham*, 121 Wash. 466, 209 Pac. 692."

From the foregoing it is respectfully submitted that Schaefer's failure to file assumed trade name of Concrete Construction Company, as required by the laws of the State of Washington, in view of the record as it was made both by Schaefer and by the other parties litigant at time of trial and as it has been maintained since, authorizes present issuance of writ of certiorari to the Court of Appeals for the Ninth Circuit so that the wrong done in that court may be

corrected conformable to the holdings of this Supreme Court of the United States.

WASHINGTON SUBSTANTIVE LAW OF CONTRACTS

Our petition (p. 2) quotes the Court of Appeals' own statement of controlling law, and (pp. 12-14) cites exact page locations of supporting declarations from the Washington State Supreme Court in 26 different controlling cases for the 8 subdivisional features in which "the Washington Substantive Law of Contracts is applicable" (to quote the Court of Appeals' exact wording, 173 F.(2d) 7, R. 2267). Those 8 features are the basis of our first 6 and 12th specifications of error (pp. 18-20) and are the identical first 6 enumerations in our summary of argument (p. 24). The same are then serially discussed, with quotations from such Washington cases, at pp. 25-39.

Respondent's brief (pp. 39-40) proposes substitution for the substantive law of Washington by quoting excerpts from two U. S. Supreme Court cases grounded on violation of federal statutes. Neither case, when studied with due relationship to controlling context, is applicable.

Considering the two federal cases: The quotation (pp. 39-40) from *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 90 L. ed. 1515, is found, respectively, at p. 688 of the U. S. report and p. 1523, 2nd col. of 90 L. ed. The word "But." beginnning the sentence, is omitted from respondent's quotation. That word "But" ties the proffered quotation to the 4 prior sentences in the paragraph omitted by respondent. The first omitted sentence discloses that the employer,

not the employee, was required to keep and failed to keep the records needed (Macri, under either his principal contract or the Schaefer subcontract, was not required to keep Schaefer's records). The second sentence adds that failure even through bona fide mistake to keep such records will not excuse the employer. With that preceding, we quote here the next two sentences omitted by respondent:

> "Nor is such a result to be contended by the rule that precludes recovery of uncertain and speculative damages. The rule applies only to situations where the fact of damage itself is uncertain."

The foregoing, we submit, annuls all applicability of respondent's quoted excerpt from such *Anderson* case.

Respondent's proffered other federal case, brought under the Sherman and Clayton Acts (p. 40) *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 90 L. ed. 652 (quotation from p. 261 of U. S. report and p. 662, 2nd col. of L. ed.), is grounded on conspiracy preventing the keeping of accurate books and accounts. The words "In such a case," starting respondent's quotation (p. 40) from such *Bigelow* federal case, refer to such conspiracy preventing the keeping of books and accounts. Petitioners Macri did not prevent respondent Schaefer from keeping any accounts. There is no such testimony. Respondent's brief (p. 9) states: "It is acknowledged that respondent did not keep records from which the exact amount or cost of the extra work could be determined * * *." Consonant with such admission, respondent's auditor

Hendershott (R. 1282-3) so testified and specifically stated (R. 1283):

> "Q. And did you have information available as to the number of man hours expended on excavation or fine grading?
>
> A. There were notations on the manifests, but I did not make any use of that.
>
> Q. What do you mean by manifests?
>
> A. The daily report from the superintendent on the job."

Respondent's brief then states (p. 40): "Respondent contends those two decisions govern the situation rather than the law of Washington, but will consider briefly petitioners' contentions." This is contrary to the Court of Appeals' own statement that "the Washington substantive law of contracts is applicable * * *" 173 F.(2d) 7 (R. 22).

Similarly, petitioners' brief (p. 28) explains how the case of *Olwell v. Nye and Nisson Co.*, 26 Wn.(2d) 282, 173 P.(2d) 652, by pp. 286-287 of Wash. report and p. 654 of such Pac. report, and the case of *Ritchie v. State*, 39 Wash. 95, 81 Pac. 79 (p. 36), by p. 99 of the Wash. report and p. 80 of such Pac. report, both cited by the Court of Appeals, 173 F.(2d) 8 (R. 2268-9), are not germane. Respondent's brief does not answer this.

Likewise, respondent's brief makes no answer to petitioner's presentation (Pet. Br. pp. 36-37) of the pivotal Washington case of *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 125 P.(2d) 275, as quoted from at such place, and the declared supporting early Washington case of *Goss v. Northern Pac.*

Hosp. Assn., 50 Wash. 236, 96 Pac. 1078, quoted from at Pet. Br. Append. 2. This is the Washington controlling law, wholly unanswered by respondent.

(Respondent's Washington citations analyzed)

Petitioner here respectfully presents brief analytical consideration of all of the Washington cases cited or quoted from by respondent's brief, none of which, it is submitted, detracts from the controlling Washington substantive law of contracts as set forth in petitioners' opening brief.

Respondent's brief (pp. 17, 18) cites *Patrick v. Bonthius*, 13 Wn.(2d) 210, 124 P.(2d) 550. Pages 213-214 of the Wash. report and p. 552, 2nd col. of the Pac. report make that *Patrick* case entirely of negative character. Such case goes no further than to hold that substantial good faith compliance with contract terms allows recovery of the contract price, less the amount required to cure defects. In that same 13 Wn.(2d) volume is the aforesaid case of *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 125 P.(2d) 275, which is positive in declaration against recovery for delays where the contract terms preclude such claim. Pertinently, the Schaefer subcontract also provides for delays (Ex. 5, par. 5, quoted at p. 35, Pet. Br.).

Maryland Casualty Co. v. City of Tacoma, 199 Wash. 72, 90 P.(2d) 226, cited Resp. Br. p. 14, is distinguishable at p. 87 of the Wash. report and p. 233, 1st col., of the Pac. report. It is there stated that while the principal contract provided against delays, the subcontract in that case did not. Schaefer's

subcontract does provide for delays (Ex. 5, par. 5, quoted p. 35, Pet. Br.), thereby making the case of *Ericksen v. Edmonds School Dist.*, 13 Wn.(2d) 398, 125 P.(2d) 275, absolutely controlling and applicable, instead of such *Maryland Casualty Company* case proffered by respondent.

Respondent's citation (p. 15) to *Schuehle v. City of Seattle*, 199 Wash. 675, 92 P.(2d) 1109, is distinguishable at p. 681 of the Wash. report and p. 1111, 2nd col., of the Pac. report, because there it is stated that the "* * * changes and deviations were material and substantial and were not covered by the contract," so that *quantum meruit* recovery was allowed. The case deals largely with the contemplation of or what should have been contemplated by the parties. It is distinguishable because Schaefer's subcontract definitely provided for alterations and changes (Ex. 5, Art. 3, Sec. 3). Schaefer furnished no statement for any claimed extras, regardless of whether or not they were ordered by Macri (R. 341, 1452, 1471, 2155).

Respondent's citation (p. 15) of *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126, is without explanation to the court that such case is primarily directed at the surety's bond liability and that, so far as the defendant construction company, as principal contractor, is concerned, the case states (p. 260 of the Wash. report and p. 128 of the Pac. report), respecting $1238.25 demanded, that "This sum was reached by *applying the rates* fixed for hauling under the forfeiture clause *of the contract*" (Italics ours).

The distinction for the holding in *Western Asphalt Co. v. Valle*, 25 Wn.(2d) 428, 171 P.(2d) 159 (cited Resp. Br. 25), is at p. 437 of the Wash. report and p. 164 of the Pac. report, where it is compared with and distinguished as a "contract implied in fact" from the case of *Chandler v. Wash. Toll Bridge Authority*, 17 Wn.(2d) 591, 137 P.(2d) 97, quoted at page 26 of petitioners' brief. Also, respondent's brief states, p. 25: "Respondent acknowledges that there can be no implied-in-fact contract contrary to an express contract." Therefore, we respectfully redirect the court's attention to the quotation from the *Chandler* case at p. 26 of petitioners' brief.

Respondent's citation (p. 21) to *Luther v. National Bank of Commerce*, 2 Wn.(2d) 470, 98 P.(2d) 667, is based upon an oral contract to devise. The gist of the contract law involved is at pp. 477-8 of the Wash. report and p. 671 of the Pac. report, none of which in any manner detracts from the positive declarations of the substantive contract law of Washington quoted and specifically cited by reference to page numbers in petitioners' brief.

Automatic Canteen Co. of Washington v. Automatic Canteen Co. of America, 182 Wash. 133, 45 P. (2d) 41, cited at p. 43 of respondent's brief, is followed by the statement: "in which the court held that damages for loss of future profits may be allowed." This is not in accord with the court's holding, set out at p. 142 of the Wash. report and pp. 44-45 of the Pac. report, denying claimed damages.

Respondent's Br. p. 42, in discussing *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 182 P.(2d)

75, states: "The court stressed this requirement:" and then purports to quote from such case, when, in fact, the proffered substance is a partial subquotation and the latter subjunctive portion only of a sentence used in that case at p. 250 of the Wash. report and p. 81 of the Pac. report. The full context of the subquoted portion of a sentence and of the whole paragraph from which such partial subquotation is lifted support use and quotation of that case in petitioners' brief, pp. 13, 32, 33.

Respondent's brief at pp. 14, 16, 41, mentions the case of *Nelson v. City of Seattle*, 180 Wash. 1, 38 P. (2d) 1034, without any citation to any page thereof for court consideration. Also, respondent's brief does not answer petitioners' presentation (Pet. Br. 28-29) that the Court of Appeals' citation to page 28 of such *Nelson* case was inapplicable. Respondent's brief (p. 21) quotes from such *Nelson* case, but omits, without so indicating, from its quotation the beginning of the first sentence partially quoted. The words omitted are: "But for reasons unnecessary to state here." Such omitted words, coupled with the full consideration of the Nelson-Vigilant claims at pp. 16-20 of the Wash. report and pp. 1040-1041 of the Pac. report, explain why such deduction was made and thereby materially detract from the claimed controlling force of respondent's quoted and eviscerated context.

In passing, and in addition to our references and quotations from the *Nelson* case, we here respectfully call the court's attention to the fact that on p. 14 of 180 Wash. and p. 1039 of 38 P.(2d) report the court

recognizes a situation between respective performances of the work similar to that urged by Schaefer here, and comments that the claims, comparable to those of Schaefer here, are conjectural, and also that at p. 25 of such Wash. report, p. 1043 of such Pac. report, the court notes: "Each kept records as to causes of delay."

We respectfully, therefore, refer the court to our citations and quotations for the substantive law of contracts in the State of Washington as epitomized at pp. 12-14 of petitioners' brief, which the Court of Appeals declared must govern (173 F.(2d) 7, R. 2267).

UNANSWERED LAW FEATURES

Respondent's brief (p. 43) states that, except for one case in 182 Wash. there mentioned and above covered in this reply brief, "None of the remaining cases cited by petitioners merits discussion, * * *." That statement is in lieu of an answer to the propositions supported by pronouncements of the Supreme Court of Washington with exact page citations in petitioners' brief (Pet. Br. pp. 12-14). Palpable examples of such avoidance by respondent are failure to answer subdivision 6 "Schaefer's Failure to Minimize His Damage Prevents Recovery," with two quotations and numerous exact page citations (Pet. Br. pp. 38-39), and the rule of 2 Fed. Law of Contracts, Sec. 487, quoted Pet. Br. p. 30, and making *U. S. v. Zara Cont. Co.*, 146 F.(2d) 606, not in point, but completely consonant with *Hawkins v. U. S.*, 96 U.S. 689, 24 L. ed. 607, at 610 (quoted Pet. Br. p.

30), and *U. S. v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 266, 70 L. ed. 938, 940, supporting the substantive law of contracts of the State of Washington.

REFUTATION OF SUNDRY ASSERTIONS

The following is submitted in reply only to refute respondent's minutia tending to detract from the real issues above discussed.

The charge is made (Resp. Br. p. 29) that "Petitioners now contend, however, *for the first time*, that the judgment was based upon simply a compilation, Exhibit 63, and not upon respondent's original books and records (Brief 4, 34)." (Italics ours) This is refuted by reference to the record (R. 139(2)) for presentation to the Court of Appeals and R. 2202 with R. 1243-1245 for presentation to the district court at trial. Petitioners, as cross-appellants, set out the same claim of error to the Court of Appeals in their opening brief at p. 29. They discussed the same at pp. 73-74 therein. This is set forth in Appendix I hereto, and we respectfully ask the court to consider it with aforesaid record citations.

The statement in Resp. Br. p. 20 that Schaefer "had executed a performance bond" is refuted by the bond itself, Ex. 34, which he did not sign and which the petitioners did not know was unsigned (R. 1449 with 1359).

Respondent's brief p. 40, respecting 14.5% overrun of concrete, is refuted by Ex. 17a, the concrete engineer's report, coupled with the testimony of the government's engineer in charge (R. 1512), and with Schaefer's own witness Bufton's testimony at

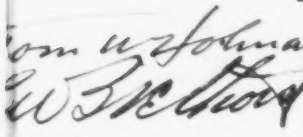
R. 1207, read with R. 1205, definitely establishing that 5% of overrun of concrete indicates unskilful operations.

The tabulation at Resp. Br. 30 omits deducting 20% of overhead on $32,614.66 admitted as timely and currently paid. The mathematical premise and tabulations (Resp. Br. pp. 35-39), wherein it is sought to demonstrate efficiency and reasonableness, answer themselves by reference to the evidence as a whole. None of this is properly a consideration for passing on a petition for writ of certiorari, but can and will be readily met, if this Court should desire to have hearing on factual features also.

CONCLUSION

In conclusion, it is respectfully submitted that the Washington cases upon the substantive law of contracts as submitted by petitioners and as amplified by the later holdings of this Supreme Court of the United States and of the State of Washington discussed in this reply brief, call for issuance of writ of certiorari as petitioned, and that, upon review, relief as prayed in petitioner's opening brief herein should be granted.

Respectfully submitted,



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APPENDIX I

Reproduction from pp. 73-74 of brief of cross-appellants Macri in Court of Appeals, Ninth Circuit.

"Further, with respect to the amount allowed Schaefer, the only evidence offered to support such a figure is Ex. 63, which purports to be a compilation from Schaefer's original books of account. The books themselves when offered in evidence were excluded. This was error. 20 Am. Jur., Evidence, 1051. Nor was there any attempt to segregate the costs (Tr. 1298-9). The witness who prepared the compilation did not keep the books. Schaefer's bookkeeper did not testify (Tr. 1265). Continuing objections pointing out the deficiencies of Ex. 63, overruled by the court, are evidenced in the record (Tr. 1245, 1251, 1252, 1259, 1265, 1266, 1267, 1275)."